

## ARTICLE 43

### Drug and Alcohol Testing Programs

This Article contains the procedures and arrangements for drug and alcohol testing of employees and applicants as required by Executive Order (EO) 12564 and Omnibus Transportation Employee Testing Act of 1991. The testing program will be administered in compliance with PL 100-71, and the Health and Human Service (HHS) Mandatory Guidelines, and the Department of Transportation Regulations, 49 CFR Parts 382 and 40, and USDA Department Regulation (DR) 4430-792-2.

- 1. Identification of Test Designated Positions (TDP):** Management has the right to designate positions for applicant and random drug and alcohol testing (Test Designated Position or TDP).
  - a. TDPs shall be only those positions that have duties and responsibilities documented in the position description, reflecting the assignment of actual work, which make the position subject to applicant and random testing. National Parties may agree to documentation other than the Position Description to identify TDPs. Employees may be designated for testing by:
    - (1) Executive Order TDPs. Positions listed in Appendix A of the DR 4430-792-2, and/or
    - (2) Department of Transportation TDPs. Position descriptions that include the operation of vehicles requiring the possession of a Commercial Drivers License (CDL) are designated as TDPs. The Forest Service will not apply state CDL testing exemptions available under Department of Transportation (DOT) regulations; that is, USDA and Forest Service testing requirements take precedence over any State or local laws to the contrary.
  - b. Changes to Existing Positions: Management will notify an employee of any change in their TDP status. If an employee's position is newly included in the random testing program, or if the employee is detailed to a TDP, they are entitled

to 30-days written notice prior to being subject to random testing, (not withstanding reasonable suspicion and post-accident testing).

- c. An employee's TDP status will be reviewed by the supervisor and the employee annually at the time of the performance review for the purpose of determining if the testing designation is still appropriate.
- d. An employee may contest their TDP status through the grievance/arbitration procedures. An employee who has filed a grievance prior to being called for a random drug or alcohol test may receive a testing deferral until a final grievance/arbitration decision is made. This deferral does not apply to Reasonable Suspicion or Post-Accident testing.
- e. An employee who is not in a designated TDP may volunteer for inclusion in the Executive Order or Department of Transportation drug-testing program. Volunteers remain in the testing pool for the duration of the position which the employee holds, or until the employee withdraws from participation by notifying in writing their supervisor of such intent before being notified of a scheduled test.

**2. Vacancy Announcement TDP Notification:** Vacancy announcements for TDPs (including competitive details and temporary promotions) will include written notice that applicant pre-appointment and random (a) drug or (b) drug and alcohol testing is a requirement of the position, and that appointment to the position and continued employment is conditional on negative test results. Each vacancy announcement for a TDP will incorporate the required language outlined by the USDA and HHS Drug Free Workplace Plans (DFWP). Failure of the vacancy announcement to contain this notice will not preclude applicant testing if a 30-day advance written notice is provided to the applicant. Employee may agree to waive the 30-day advance notice and agree to be tested earlier.

**3. Training:** DFWP training is intended to be accomplished primarily through computer-based training, and may be supplemented with other means such as formal orientation, written material, videos, lectures, and awareness training.

- a. Generally, all employees will receive annual training on the DFWP.

- b. Employees shall receive DFWP training within 30 days of entry into a TDP (or conversion to a TDP), with annual refreshers. New employees shall receive DFWP training within 30 days of receipt of access to the training modules. Training shall cover topics outlined in USDA DR 4430-792-2 and this Article including: (1) USDA drug and alcohol testing program; (2) employee safeguards in the testing program including Safe Harbor and the right to union representation; (3) employee assistance and counseling programs; (4) types of drugs and their effects; (5) laboratory procedures; (6) Medical Review Officer duties; and (7) protections associated with reporting suspected drug use by co-workers and supervisors.
  - c. Supervisors or managers of NFFE Bargaining unit employees shall receive appropriate training prior to requesting reasonable suspicion testing.
- 4. Self Identification:** The parties encourage voluntary disclosure by an employee of substance use (legal or illegal drugs or alcohol) that would impair them from performing safety sensitive duties.
- a. Self-identification is deemed to occur when an employee, after becoming aware of a safety sensitive work assignment (for example, vehicle operation), notifies their supervisor or the responsible Management official of the employee's potential impairment at the first reasonable opportunity and before beginning to perform the assignment. If an employee self identifies and is unable to perform an assignment, Management will not initiate disciplinary action regarding the first instance of impairment. Additional instances of impairment may be subject to discipline. However, the employee may still be subject to disciplinary action for any other related or unrelated misconduct beyond this instance of impairment.
  - b. Safe Harbor: EO 12564 mandates disciplinary action shall be initiated for illegal drug use by any employee regardless of TDP status except when an employee self identifies and seeks "safe harbor."
    - (1) In order to be eligible for Safe Harbor, the employee must:

- (A) Voluntarily identify himself/herself as a user of illegal drugs or volunteer for drug testing prior to being identified through other means,
  - (B) Obtain counseling or rehabilitation through an Employee Assistance Program; and
  - (C) Thereafter, refrain from using illegal drugs.
- (2) Safe Harbor is not available to an employee who requests Safe Harbor protection from discipline after being directed to submit to a test.
  - (3) Employees eligible for Safe Harbor are removed from safety-sensitive duties until the treatment program is completed and a return-to-duty test is passed. Employees are then subject to a regime of follow-up tests.
  - (4) Safe Harbor only protects the employee from action being taken based on the admission of substance abuse. It is not a shield from disciplinary action based on misconduct. Neither does it shield the employee from corrective action based on drug use determined by other means, or misconduct/poor performance related to substance abuse.

**5. Reasonable Suspicion Testing:** Reasonable suspicion is a belief that an employee has violated alcohol or controlled substances prohibitions based on direct observations of drug use or possession and/or the physical symptom(s) of being under the influence of a drug (for example, a pattern of abnormal conduct or erratic behavior).

- a. Executive Order Testing for All Employees. All Forest Service employees are subject to testing when there is a reasonable suspicion of on-duty illegal drug use or impairment.
- b. Employees in Executive Order TDPs may be subject to testing when there is a reasonable suspicion of illegal drug use on or off duty.
- c. Executive Order Reasonable Suspicion testing will be initiated in accordance with the DR 4430-792-2 after first making appropriate factual observations, documenting those observations, and obtaining appropriate authorization to conduct the test. However, failure of observers to receive training on reasonable

suspicion testing procedures shall not invalidate otherwise proper reasonable suspicion testing. Testing will be administered within 32 hours of the last observed behavior or event which prompted the supervisor or agency official to request testing unless delayed by events beyond the control of either the agency or the employee. In no case will tests be conducted beyond 72 hours of the last observed behavior or event.

- d. Employees in DOT TDPs are subject to alcohol and drug testing when there is a belief that an employee has violated alcohol or controlled substances prohibitions based on specific and timely observations that can be clearly articulated concerning the appearance, behavior, speech, or body odors of the employee made just before, during, or just after the period of the work day in which the employee was expected to be in compliance with drug and alcohol standards. The observations may include indications of the chronic and withdrawal effects of controlled substances. The term "just" as used above, is defined as meaning the time period immediately prior to and/or after work hours while the employee is physically at the duty location or work site.
  - (1) Reasonable suspicion testing for employees in DOT TDPs will be requested based on the direct observation and documentation of one or more supervisors trained in detecting the signs and symptoms of possible alcohol/drug use. Training records will be furnished to the union upon request.
  - (2) Alcohol testing will be administered promptly within 2 hours, and no later than 8 hours after the employee is asked to submit to testing, in accordance with 49CFR382. Testing for any other substances will be conducted within established timeframes under DOT regulations.
- e. General Provisions for Reasonable Suspicion Testing:
  - (1) The appropriate trained supervisor or Management official will gather and document all information including dates and times, facts, information sources, and circumstances leading to and supporting the suspicion. This information is submitted to the Director, Human Resources Management, or appropriate delegate who has the authority to approve reasonable suspicion

testing requests. Copies of these records will be provided to the Union upon request in conjunction with representational matters in accordance with the Privacy Act.

(2) Before the testing occurs, the employee will be informed of the reasons for the test and provided with the documentation described in (1) above, excluding information sources.

(3) Under no circumstances shall reasonable suspicion testing be used as a punitive measure.

#### **6. Post-Accident Testing:**

- a. Post-accident testing applies to all employees if they meet Executive Order post-accident testing criteria. Employees in DOT Test Designated Positions are covered by DOT provisions while they are driving a commercial motor vehicle. Accidents that do not meet the criteria for post-accident testing may still result in an employee being tested under the reasonable suspicion program if criteria for testing under that program are met.
- b. Executive Order post-accident testing for illegal drugs covers all employees who are reasonably suspected of having caused or contributed to an accident that occurred within the scope of their employment or while in official duty status; the Director, Human Resources Management, or appropriate delegatee will use objective evidence to make this determination.
- c. Executive Order post-accident testing for illegal drugs is also required when the accident results in:
  - (1) Death or personal injury requiring immediate hospitalization for in-patient treatment (as opposed to short-term emergency room care), or
  - (2) Damage to Government or private property estimated to be in excess of \$10,000. The damage estimate shall be made by an agency official using an objective basis.
- d. Executive Order post-accident tests for illegal drugs must be completed within 32 hours of the accident.

- e. DOT post-accident testing applies to drivers involved in accidents while performing safety-sensitive functions associated with operating a commercial motor vehicle, and requires testing for both alcohol and controlled substance use. Alcohol testing will be administered promptly within 2 hours, and no later than 8 hours following the accident; drug testing must be administered within 32 hours of the accident. Testing is required when the accident results in:
  - (1) Loss of human life, or
  - (2) Citation to the driver for moving vehicle accident and accident results in:
    - (A) Injury requiring medical treatment away from scene of accident, or
    - (B) One of the vehicles has to be towed.

## **7. Random Testing:**

- a. Employees who are eligible for random testing under **both** the Executive Order (that is, drug testing) and DOT regulations (that is, drug and alcohol testing) will be randomly selected only under the DOT program.
- b. Prior to scheduling testing, the supervisor will confirm the employee's availability. Whenever possible, Management will schedule testing so it can be completed during the employee's normal workday. At the time of notification, employees will proceed to the test site immediately or as soon as possible, as instructed by the supervisor.
- c. A deferral of a random drug test may be granted if the employee is unavailable due to being:
  - (1) In an approved leave status (sick, annual, administrative, or leave without pay);
  - (2) In official travel status away from the test site or is about to embark on official travel scheduled prior to testing notification; or
  - (3) A grievant pursuant to Subsection 1.d of this Article.

An employee whose random drug test is deferred will be subject to an unannounced test within the following 60 days.

## **8. Travel Time and Attendance:**

- a. Employees shall be on official time for Management-directed drug and alcohol testing related activities, including travel.
- b. The agency shall pay travel expenses and/or provide transportation for testing in accordance with Federal Travel Regulations.
- c. Overtime shall be paid or compensatory time approved in accordance with applicable laws and the Master Agreement.

## **9. General Testing Procedures:**

- a. Urinalysis is the only testing method used for drug testing in this program. Use of any other drug testing method may be negotiated, as appropriate, by the National Parties.
- b. Employees selected for drug testing will be provided a checklist, the contents of which will be negotiated by the Parties at the national level.
- c. Collection of samples will be done in accordance with applicable HHS Mandatory Guidelines under Executive Order provisions, and in accordance with DOT regulations for DOT-covered positions. Employees are permitted to provide specimens in private unless there is a legitimate need for observation. Examples of when a sample would be observed include return-to-duty testing and suspicion of tampering. Observation must be approved by an authorized Agency official and performed by an individual of the same gender.
- d. Employee may be required to provide another sample based on suspicion of tampering with the specimen.
- e. An employee who is subject to being observed while providing a urine sample may request a written statement specifying the reasons for the observation, and may ask to have a Union representative present. The observed collection shall be delayed a reasonable amount of time to permit a Union representative to travel to the collection site, provided the sample collection will occur on the designated test day, and within the time limits prescribed for reasonable suspicion and post-accident testing, to preserve sample integrity.



- f. All reasonable available means will be used to protect the dignity and privacy of employees with physical handicaps or other impairments that may prevent them from providing urine specimens in the usual manner.
- g. If an employee is unable to provide a volume of urine adequate for testing purposes, they will be given a reasonable amount of liquid (water, tea, or coffee). The Forest Service will allow the employee up to 3 hours on the same testing day to provide a sufficient volume.
- h. If the employee is unable to provide the required specimen quantity, the testing will be discontinued and the clinic will notify the Medical Review Officer (MRO) and the Agency's Drug Testing Coordinator. They will be contacted by the MRO who will request satisfactory medical documentation or arrange for a medical evaluation to determine whether there is a genuine reason for the employee's inability to provide a specimen or a refusal to test. (49 CFR 40.193)
- i. Employees shall not be required to disclose the legitimate use of specific drugs at the outset of the program. Employees will have an opportunity to provide documentation to the MRO supporting legitimate usage upon a positive test result. Only verified positive test results are reported to the Agency.
- j. An employee may arrange for private testing within 24 hours of providing an Agency-directed urine sample. A reasonable amount of appropriate leave may be approved.

**10. Split Sample Collection and Testing:** Split sample testing procedures as contained in DOT regulations will be followed for all sample testing. If the first sample produces a positive result, and the employee requests a test of the split sample within 72 hours, then the second test will be performed.

**11. Second Sample Collection and Testing:** Employees being tested may elect to have a second sample collected at the same time as the USDA sample and have it submitted by the sample collector at the employees' expense to an HHS accredited laboratory of their choice in accordance with HHS and USDA procedures pertaining to drug testing. If a reasonable suspicion test has been conducted and the first

sample tests positive for drugs whereas the second sample tests negative, the employee may request and shall receive reimbursement for the cost of the second test.

#### **12. Response to a Positive Drug or Alcohol Test:**

- a. Management shall review any positive drug test, that is, consider an employee's explanation, the accuracy of the lab procedures, etc.
- b. The Parties recognize alcoholism and other drug dependencies as illnesses. It is the intent of the Parties to support rehabilitation of these employees so they can be retained in the workforce. The employee shall be referred to the EAP (see Article 26).
- c. Currently under EO 12564, the agency shall initiate action to remove from the service any employee who is found to use illegal drugs and
  - (1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program (EAP) or
  - (2) Does not thereafter refrain from using illegal drugs.
- d. Management shall meet its obligations under the Rehabilitation Act of 1973.

#### **13. Records Retention:**

- a. Records pertaining to an employee's drug and alcohol tests are confidential and releasable on a need to know basis and as otherwise required by law. These records are covered by the Privacy Act and shall be maintained in the Agency's secured files.
- b. Positive drug test results will be retained—
  - (1) In accordance with disciplinary or adverse action record retention policy, when the document is part of a disciplinary or adverse action file;
  - (2) In accordance with DOT regulations as they pertain to records retention;
  - (3) In accordance with Executive Order, HHS, and USDA regulations and policies.

#### **14. Union Representation:**

a. Employees may invoke their Weingarten Right to Union representation as appropriate (see Article 4).

b. TDP information

(1) Designation of new classes of TDPs is a change in conditions requiring appropriate notifications per Article 11.

(2) Annually in July, Management will furnish the FSC President or designee a servicewide list of any and all:

(A) Positions in the random test pool, including, at a minimum, the employee name, position title, series, grade, organization coding, and test pool designation code for each position,

(B) Employees who were randomly selected for testing during the past year, and

(C) Employees who were tested during the past year.

c. Laboratory Information:

(1) Upon request, Management will make available to the Union at the national level a list of the clinics and laboratories being used.

(2) The Parties agree to jointly pursue an approval from the USDA for Union inspection of any testing facilities or certified laboratories used in the agency's testing program. Article 5 release procedures for the Union representative are to be followed.